Supreme Court, U.S.
FILED

05 146 JUL 26 2005

OFFICE OF THE CLERK

In the
Supreme Court of the United States

James WILLIAMS, ~~Jr.; Jimmy E.~~ McKelvy; James Gilchrist; Bobby Lacy; Robert McKithen, Jr.; Kevin McKie; Robert Cooks, Jr.; Edward N. Gray; Nathaniel Lockhart, on behalf of themselves and all others similarly situated, Plaintiffs

OF WHOM James Williams, Jr. and Nathaniel Lockhart, are Petitioners,

v.

William J. HENDERSON,
Postmaster General United States Postal Service,
Respondent,

and

Richard E. Barnhill; David O. Brandon; Charles J. Cutter, II; Emma Oliver; Penny Joye; Sonny Powell; John A. Frye; James Stih; Ronald Hopson; David Black, Defendants.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Deborah Harrison Sheffield
Law Office of Deborah
Harrison Sheffield, P.A.
117 Brook Valley Road
Columbia, S.C. 29223
(803) 419-7837

Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

The Petitioners are two black employees of the United States Postal Service in the Florence, South Carolina facility, where no blacks had been promoted to any supervisory levels within a ten-year period. They brought this Title VII action alleging that the USPS refused to promote them because of their race. The Court of Appeals has affirmed the grant of summary judgment to the USPS based on the excuse that the employees failed certain tests. This case presents important questions regarding the type and quantity of evidence which a postal employee must present to create a triable issue as to the legitimacy of the promotion testing process as conducted and followed in that facility.

1. Can a black postal employee use statistical proof that no blacks had been promoted to upper levels in the local facility within a ten year period to help establish a prima facie individual disparate treatment claim under the McDonnell Douglas framework?

2. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed the MSS national test based on the testimony of its in-house "expert" who had exclusive control over the testing documents and the secret scoring process where the employee presents evidence that the white management at the local facility had the opportunity to manipulate the testing process and had circumvented the MSS process to promote white employees who did not even test in addition to statistical evidence that no blacks had been promoted to upper levels in the local facility within a ten-year period and an EEOC finding that his white supervisor intentionally discriminated against him on his evaluation?

3. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed a "test" where the "test" consisted of a series of questions personally developed by the white hiring supervisor and consisted of subjective questions not capable of "right" or "wrong" answers?

4. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed a "test" where the answers were not recorded and the white hiring supervisor's "scoring" comments and markings show unduly enthusiastic preference of the white candidate?

List of Parties

The Petitioners are James Williams, Jr. and Nathaniel Lockhart.

The Respondent is the Postmaster General of the United States Postal Service.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 1

1. Procedural History 1

2. Factual Background 2

The USPS Maintenance Selection System 3

The Florence Facility 5

Williams' Efforts to Promote through the MSS 7

Lockhart's Promotion Efforts 10

Reasons for Granting the Writ 12

I. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Williams' Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a test and

rejecting as speculative circumstantial evidence which raises triable issues as to manipulation of the testing process by white supervisors in the local facility and the conclusiveness of that test in qualifying the employees for the promotion registers. 12

II. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Lockhart's Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a "test" and rejecting as speculative circumstantial evidence which raises triable issues as to the objectivity and legitimacy of the "test" and the objectivity of the administration and scoring of the test. 19

Conclusion 22

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 12

Int'l Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 17

McDonnell-Douglas Corp. v. Green,
411 U.S. 792 (1973) 11, 12, 13, 17

Senter v. General Motors Corp.,
532 F.2d 511 (6th Cir. 1976) 17

Spight v. Tidwell Indust., Inc.,
551 F. Supp. 123 (N.D. Miss. 1982) 19

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) 11, 13

Wang v. Hoffman,
694 F.2d 1146 (9th Cir. 1982) 19

Statutes

42 U.S.C.A. § 2000e-2(h) 21

42 U.S.C. § 2000e-16(a) 1

James Williams, Jr. and Nathaniel Lockhart respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unofficially reported at 129 Fed.Appx. 806, and it also is set forth in the Appendix (App. 1). The opinion of the District Court is unreported and it is set forth in the Appendix (App. 15).

JURISDICTION

The opinion of the Court of Appeals was entered on April 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 provides that "[a]ll personnel actions affecting employees ... in the United States Postal Service ... shall be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a).

STATEMENT OF THE CASE

I. Procedural History

This action was initially commenced by nine African-American employees of the United States Postal Service ("USPS") as a class action against the Postmaster General of the USPS for denying them promotions because of their race, in violation of Title VII of the Civil Rights Act of 1964. The District Court refused to allow the action to proceed as a class action and granted summary judgment in favor of the

USPS on all claims.

As to Lockhart, the District Court held that while he may have established a prima facie case under the *McDonnell Douglas* framework, he failed to present sufficient evidence to rebut the USPS's proof that his scoring on a postal operations test was a nondiscriminatory reason for its decision not to promote him.[1] As to Williams, the District Court held that the he failed portions of the MSS written exam which preclude him from establishing that he is qualified and establishes a legitimate, non-discriminatory basis for his failure to be promoted.

The Court of Appeals for the Fourth Circuit affirmed, finding that the District Court properly refused to allow the case proceed as a class action and that four of the employees' claims were properly denied because they failed to exhaust their administrative remedies. As to the individual claims of these two Petitioners, the Court of Appeals held that they failed to present sufficient evidence from which a reasonable factfinder could conclude that they were denied a promotion on the basis of race.

2. Factual Background

The plaintiff employees, who are African American, are employees of the United States Postal Service in the Florence District. Williams is employed in the maintenance craft; Lockhart is a letter carrier in the distribution area. At various times during their employment with the USPS, they have applied for promotions and been denied or passed over based on their race.

---

[1] The District Court also held that Lockhart had not exhausted his administrative remedies. However, the USPS conceded that he had, in fact, exhausted his remedies. [JA 1213; *See also* JA 250.]

The USPS Maintenance Selection System

The Maintenance Selection System (MSS) is the process the Postal Service uses to select the best qualified candidate for most postal maintenance positions. There are three types of applicants for these positions, and the process is different depending upon the type of applicant: entrance, incraft, or inservice.

Maintenance Craft Career Employees are given first priority in filling vacancies in the maintenance craft.[2] Incraft employees are given the opportunity to fill a vacant position based on their standing in the Promotion Eligibility Register (PER). That standing is determined by the results of their completion of the MSS process for the Group that includes that position.

According to the MSS Guidebook, there are seven steps in the incraft MSS Application process: (1) announcement, (2) application, (3) record review, (4) review panel evaluation, (5) examination, (6) supervisor evaluation, and (7) results. Although the review panel evaluation, written examination, and supervisor evaluation form the three-part substantive basis of the decision-making process.

After the Human Resources makes an announcement that the postal employee can apply for the Maintenance

---

[2] There are four circumstances under which maintenance craft employees can apply to be included in a PER: (1) when first entering the maintenance craft; (2) when a facility announces a maintenance position newly authorized in that office; (3) when an employee transfers to another maintenance facility, or (4) when there is an official MSS Open Season in March, every three years.

Eligibility Register [Step 1], the employee submits an application and receives a CSA (Candidate Supplemental Application) book to provide their knowledge, skills, and abilities for each individual position requirement. When the employee completes and returns the CSA book, an Employee Maintenance Application (EMA) form is completed and is sent to the National Test Administration Center (NTAC) [Step 2]. At the NTAC, the forms are matched with records already in the database [Step 3], and NTAC sends back a list of the applicants and any components they already have on file, and then a review panel is conducted by the senior maintenance Manager or designee [who serves as chairman], a maintenance supervisor from the functional area, and a Human Resources Representative [Step 4]. The Panel review process is designed to evaluate the training, education, and experience attained and documented by the candidate as it relates to the KSA requirements of the position being evaluated.[3] The Review Panel members must not be the immediate supervisor of any applicant or the person who completed the supervisor's evaluation for any applicant who will be rated by that panel. The examinations must take place after the Review Panel Evaluations [Step 5]. The exams are conducted by NTAC-certified examiners according to the general rules and procedures disseminated by NTAC. Then the immediate supervisor completes the supervisor evaluation form which is reviewed and completed by the next higher level supervisor [Step 6]. The supervisors use a 1 to 5 rating scale, with 5 representing superior knowledge; however, the supervisors can give an employee a "CE" for "cannot evaluate" for any particular KSA.

The HR MSS Coordinator sends the panel review forms, examination and supervisor review forms to the NTAC for scoring. The results are returned to the district

---

[3] They use a performance level scale of 5, 4.5, 4, 3.5, 3, 2.5, 2, 1.5 and 1

office and the applicant, and applicants who qualify are placed on the Register according to their rating [Step 7]. The applicants do not receive their actual test back showing which answers they missed; nor do they even receive a score on the written exam. Rather, they receive a KSA summary report listing all KSA's for each position for which the applicant have applied which simply identifies the KSA's which the applicant failed or those where he rated below average.

If an applicant is rated as ineligible, he can update failed KSAs if he first obtains additional education, training or experience relevant to the KSA which he wishes to update. Updating is not automatic; the local MSS Coordinator has the discretion to determine if the new or additional education, training or experience is relevant before allowing the update.

The Florence Facility

At the times in question, all the managers, examiners, trainers, and evaluators[4] in the MSS process within the Florence Facility were white. During a ten year period while those white people were in control of the MSS testing and evaluation process, no black maintenance workers were promoted to the upper levels in the Florence Facility. At the relevant time period, there were 40 workers in the maintenance craft during the relevant time frame of whom 15 were black males, 24 white males, and one white female.

---

[4] Richard Barnhill, Maintenance Supervisor and MSS Coordinator; Charlie Cutter, Maintenance Manager; David Brandon, Maintenance Supervisor; David Black, Supervisor of Field Maintenance operation; James Stih, Human Resources manager; Myrtle Ann Gibbons, HR tester/trainer; Don Watford, "ad hoc" tester/trainer.